IN THE

Supreme Court of the United States

October Term, 1944

No. [redacted] 62

THE EAST NEW YORK SAVINGS BANK,
Appellant,

against

ALVIN HAHN and HANNAH HAHN, his wife,
Appellees.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM AMICUS CURIAE

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To the Honorable the Chief Justice and Associate Justices of the United States Supreme Court:

Now comes the Attorney-General of the State of New York, having been directed by the Court of Appeals of the State of New York to appear in that court, pursuant to the provisions of § 68 of the New York Executive Law, for the purpose of defending the constitutionality of Chapter 93 of New York Session Laws of 1943, and files his statement as *amicus curiae* in opposition to appellant's Statement as to Jurisdiction, and moves that the appeal herein be dismissed, or that the order and judgment appealed from be

Jurisdiction

The protection of the contract and due process clauses of the Federal Constitution (Art. I, § 10; 14th Amendt. § 1) having been duly invoked below, the question of jurisdiction of this court depends upon whether any substantial ground exists in the record for claiming the protection of those clauses.

The constitutionality, under emergency conditions which demand such relief, of statutes interfering with a mortgagee's right of foreclosure has been upheld by this court in *Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398, which was followed by the New York Court of Appeals in *Loporto* v. *Druiss Company, Inc.*, 268 N. Y. 699; and *Maguire & Co.* v. *Lent*, 277 N. Y. 694 (upholding New York mortgage moratorium statutes without any provision for amortization).

The New York statute here under attack (L. 1943, c. 93, amending C. P. A. § 1077-g) suspends the right of foreclosure for principal defaults, on condition that the owner pay the unpaid principal amount at the rate of 1% per annum (increased to 2% in 1944—L. 1944, c. 562). Interest, taxes and insurance must also be paid currently by the mortgagor in order to avoid foreclosure, and they have been so paid by the appellees herein, as appellant concedes.

The sole question involved is, therefore, whether the New York Legislature in March, 1943 properly determined that there were such facts as to justify either a finding of the continuance of the emergency which led to the original passage of the mortgage moratorium legislation (Chapter 793 of the Laws of 1933) or a finding of the existence of a new emergency, arising from war conditions, and calling for a modified continuance of the moratorium.

We submit that appellant's contentions are so unsubstantial as not to need argument before this court, but on the contrary to warrant this court in disposing of the appeal at this stage.

Opinions Below.

Opinions of the courts below are reported as *East New York Savings Bank* v. *Hahn, et al.*, in 182 Misc. 863, 51 N. Y. S. (2d) 496 (Sup. Ct., Kings Co., Fennelly, J., July 31, 1944), affirmed, 293 N. Y. 622 (Ct. App., December 30, 1944).

The trial court, on the issue of the existence of conditions justifying the legislation, and limiting itself to the first alternative stated above, said:

> "The mortgage market is, of course, inseparably connected with the real estate market. Testimony was submitted by plaintiff that can well be credited, that the real estate market in 1943 was active and gave indications of being more active in 1944. The testimony shows, and it is a matter of common knowledge, that much foreclosed institutional real estate has been liquidated. For the purpose of collecting and distributing mortgage and real estate information to the savings banks supporting the service, New York State is divided into groups. Group 5 embraces Long Island and Staten Island. The chief statistician of this group prepared figures showing real estate holdings of this group that resulted from mortgage investments. The figures show that member banks in Brooklyn had an overhang of real estate as of the end of 1939 of $49,360,469; and as of January 1, 1944, of $17,105,680. In Queens the figures were at the end of 1939, $9,808,417; and as of January 1, 1944, $3,857,742. In Nassau the figures were at the end of 1939, $2,487,143; and as of January 1, 1944, $495,952. There is still to be liquidated, and was at the time of the commencement of this action, a considerable amount of real estate held by savings banks, insurance companies, Home

Owners' Loan Corporation and the trustees of estates. Not until the holdings of these unwilling owners of real estate have been reduced, so that they are no longer a factor in competition with the real estate of those who willingly acquired real estate and are willing but not forced to sell, can it be said that there is a normal real estate market.

"The Legislature had the right, in its judgment, to determine that abnormal deflation of real property values, in view of these circumstances, existed at the time it enacted the renewal legislation of 1943. This was one of the reasons upon which the original moratorium legislation of 1933 was based. The emergency, in the court's opinion, still existed at the time this action was commenced." (at pp. 864-65 of 182 Misc.)

The Attorney-General was not given notice of the constitutional issues in the trial court.

Upon a direct appeal to the Court of Appeals, additional facts and statistical data within the realm of judicial knowledge were submitted for its consideration. These indicated the direct and inevitable effect on the real estate and mortgage market of the national war emergency with its attendant factors, such as rent and wage ceilings on the one hand and rising individual and corporate taxes and costs of maintenance on the other. Moreover, reference was made to the message of the Governor to the 1943 State Legislature reciting the existence of these new emergency factors (1943 Leg. Doc. No. 1, p. 9), and also to the report of a Joint Legislative Committee on the mortgage moratorium, made in 1942 after an exhaustive study into the existing facts and the increasing effect of the war economy on the general situation (1942 Leg. Doc. No. 45). The plaintiff agreed in the Court of Appeals that this report should be considered as part of the record in this case. Accordingly a copy is being filed with these motion papers.

With all these facts before it the Court of Appeals found that the 1943 enactment of the New York State Legislature was, as a matter of fact, justified, saying (p. 628):

"Doubtless such a judicial inquiry would disclose that many—perhaps all—of the adverse conditions created by the 'abnormal disruption in economic . . . processes' which, as the Legislature found, existed in 1933 and resulted in a 'public emergency,' disappeared before 1943. The Legislature did not, in 1943, find that these conditions still existed. It found only that the 'serious public emergency' existing in 1933 and '*resulting*' from these conditions, still existed. In 1943 the fact that payrolls and savings bank deposits had increased in almost unprecedented degree was a matter of common knowledge. The Legislature could not ignore the great changes in the economic situation. On the other hand, an accumulation of past due mortgages, resulting from the ten-year-old ban upon actions to foreclose mortgages for default in the payment of principal might reasonably cause apprehension that a flood of foreclosure actions would follow removal of the ban and might itself justify a statute reasonably calculated to stem the impending flood. Reports which legislative committees made to the Legislature in 1938 and 1943 as well as a message of the Governor called to the attention of the Legislature also the fact that abnormal conditions incident to a war economy or resulting from other causes might still constitute a threat 'to the welfare, comfort and safety of the people of the state' and might call for the exercise of the legislative power to provide an extraordinary remedy for extraordinary conditions.

"The presumption is that the Legislature 'inquired and found' that under the conditions then disclosed there was need for a continuance of the suspension of the right of holders of bonds and mortgages to foreclose for default in the payment of the principal. (Szold v. Outlet Embroidery Supply Co., 274 N. Y. 271, 278). It is entirely unimportant whether the conditions then existing have created a new emergency, as said by the Governor in his message, or have, as the Legislature said, resulted in the continuance of an emergency it-

> self created by conditions which have run their course. The question which the court must decide is whether the Legislature in the challenged statute has provided an appropriate remedy to tide over an exigency resulting from present conditions. We have said in an analogous case that: 'Whether an emergency exists or not, the test in each case is whether a situation exists which calls for the exercise of the reserved power of the state and whether the remedy adopted by the state is reasonable and legitimate.' (Matter of People [Tit. & Mtge. Guar. Co.], *supra*,* p. 94). We conclude that the challenged statute meets that test." (Italics the court's.)

These determinations of both the New York courts as to the continuance of the emergency or the development of a new emergency, are both based upon findings of fact, which we submit this court should accept, namely, the cumulative effect of war emergency conditions, with their attendant circumstances mentioned above, upon a pre-existing deflated real estate and mortgage market, and the dangers inherent in an abrupt termination of the moratorium, which might cause a disastrous flood of foreclosures.

Facts and Argument Supporting Decision Below

Among the supporting facts which underlie these findings are the statement of the Joint Legislative Committee in 1942, that the amount of outstanding mortgages still within the protection of the mortgage moratorium laws was approximately five billion dollars (1942 Leg. Doc. No. 45, p. 15); the fact that many thousands of persons were employed on a fixed salary, or were dependent upon fixed retirement income, and unable to pay their entire mortgage indebtedness immediately, especially under the impact of increased cost of living and increased taxes (*id.* 19-22); the further

* 264 N. Y. 69.

fact that the allegedly active real estate market of 1943 involved sales for an average consideration of only approximately 63% of the assessed value of the property (Members' News Bulletin of Real Estate Board of New York for Feb. 1944); and the further fact that official figures from various sources showed over half a billion dollars of involuntarily acquired real estate still in the hands of financial institutions and investors. Obviously a bill which permitted immediate foreclosure of all the outstanding moratorium-protected mortgages might cause a disastrous break in the already depressed real estate market.

The State Legislature may properly be presumed to have considered these factors in enacting Chapter 93 of the Laws of 1943, even in the absence of its exhaustive joint legislative investigation. (*Townsend* v. *Yeomans*, 301 U. S. 441, 451-452; *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 594.) As this court said in *United States* v. *Carolene Products Co.*, 304 U. S. 144 (at p. 154):

> "But by their very nature such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it."

The conditions justifying the continuance of legislation need not be the same as those which called for its original enactment (*Biddles, Inc.* v. *Enright*, 239 N. Y. 354).

Appellant predicates its right to this appeal and this court's jurisdiction upon *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543, which determined that if the facts which originally supported emergency legislation shall have ceased, then the continued constitutionality of such legislation may be brought into question and subject to further judicial inquiry. In that case Mr. Justice Holmes, who wrote the

opinion, referred to facts within the judicial knowledge of the court to support his ruling (p. 548); by the same principle, where the facts justifying the statute are matter within judicial knowledge, this court need not accept jurisdiction to review them further.

The plaintiff in the court below cited decisions in other states which have held that mortgage moratorium laws were no longer constitutional. It is sufficient answer to those cases, if they be invoked in opposition to this motion, that none of them considered a state of facts such as was found to exist in New York in 1943, and that none of them involved a statute such as the New York moratorium law here attacked (L. 1943, c. 93), which requires a definite amortization of principal as well as payment of interest and taxes in order to retain the benefits of the statute.

Here the legislation has been based upon findings of war factors already accepted as conclusive by not only the Legislature (the joint legislative investigating committee's report), but also by both other branches of government, the executive (the Governor's annual message to the Legislature), and the judiciary (the opinions of both of the lower courts). We respectfully submit that this court should not undertake to upset this concurrent finding of fact, especially when it is supported by matters within the scope of judicial knowledge.

Motion to Dismiss or Affirm.

The motion to dismiss or affirm is made upon the ground that questions upon which jurisdiction is asserted are so insubstantial as not to need further argument. The *Chastleton* case, *supra*, merely asserted that the trial court had and ought to exercise the power (which it had refused to exercise), of making findings of fact as to the continuance of the

emergency necessary to support the legislation in question. It did not hold, nor has any authority been found, which asserts that this court must assume jurisdiction to determine, in any and all cases where an appellant seeks to continue litigation, by further appeal, the factual question of the continuance of an emergency, when such question has been determined in the affirmative by both the lower and highest court of a state (cf. *Bodkin* v. *Edwards*, 255 U. S. 221, 223; *Thomas* v. *Kansas City Southern Ry. Co.*, 261 U. S. 481).

The appeal should be dismissed or the judgment appealed from affirmed.

Dated, March 22, 1945.

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